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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1242

LEWIS S. ROSENSTIEL, *Petitioner,*

v.

SUSAN L. ROSENSTIEL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	9
I. Jurisdiction	
The Mexican Decree Cannot Be Enforced Because It Was Rendered Without Jurisdiction	13
II. Due Process	
Petitioner Has Been Denied Due Process of Law by the Enforcement Against Him of This Void Mexican Decree	15
III. Internationalizing Williams	
Uniform Nation-Wide Jurisdictional Standards Should Be Prescribed for the Recognition of International Divorce Decrees	22
IV. Prospective Invalidation	
The Determination That Such Mexican Decrees Are Void Need Not Go Beyond This Decree and Those Rendered Hereafter	24
Conclusion	26
Appendix A Statutes Involved	1a
B Opinion and Judgment of the Supreme Court for New York County	2a

Page

C Order and Opinions of the Appellate Division, First Department 21a

D Opinions and Judgment of the Court of Appeals 29a

E Relevant Portions of Petitioner's Briefs in the Court of Appeals 51a

CITATIONS

CASES:

Alton v. *Alton*, 207 F. 2d 667 (3rd Cir. 1953) *certiorari vacated because of intervening mootness*, 347 U.S. 610 (1954) 17
Baker v. *Baker, Eccles & Co.*, 242 U.S. 397 (1917) 16
Bethune v. *Bethune*, 192 Ark. 811 (1936) 23
Bingham v. *Miller*, 17 Ohio 448 (1848) 25
Bobala v. *Bobala*, 68 Ohio App. 63 (1940) 23
Caldwell v. *Caldwell*, 298 N.Y. 148 (1948) 9, 14, 15, 18
Esenwein v. *Pennsylvania*, 325 U.S. 379 (1945) 10
Fearon v. *Treanor*, 272 N.Y. 268 (1936) 11
Golden v. *Golden*, 41 N.M. 356 (1937) 23
Gottesman v. *Gottesman*, (Dist. of Colum. Ct. of Gen'l Sess., No. D2912-64, April 12, 1966) 23
Gould v. *Gould*, 235 N.Y. 14 (1923) 14, 15, 18
Great Northern R. Co. v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932) 12
Griffin v. *Griffin*, 327 U.S. 220 (1946) 16, 17
Hanson v. *Denckla*, 357 U.S. 235 (1958) 17
Harrison v. *Harrison*, 214 F. 2d 571 (4th Cir. 1954) *cert. denied* 348 U.S. 896 13
Hilton v. *Guyot*, 159 U.S. 113 (1895) 21, 22
Home Insurance Co. v. *Dick*, 281 U.S. 402 (1929) 17
Hughes v. *Fetter*, 341 U.S. 609 (1951) 20
Kojis v. *Doctors Hosp.*, 12 Wisc. 2d 367 (1961) 25
Linkletter v. *Walker*, 381 U.S. 618 (1965) 12, 25
Maynard v. *Hill*, 125 U.S. 190 (1888) 2, 11, 17
Molitor v. *Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11 (1959) 25
National Exchange Bank v. *Wiley*, 165 U.S. 257 (1904) 16
Old Wayne Mut. Life Asso. v. *McDonough*, 204 U.S. 8 (1907) 16

Page

Parker v. *Port Huron Hosp.*, 361 Mich. 1 (1960) 25
Pennoyer v. *Neff*, 95 U.S. 714 (1878) 16, 17
Riley v. *New York Trust Co.*, 315 U.S. 343 (1941) 16
Rosenbaum v. *Rosenbaum*, 309 N.Y. 371 (1955) 10, 14, 15, 18, 21
Warrender v. *Warrender*, 42 N.J. 287 (1964) 23
Williams v. *North Carolina* [II], 325 U.S. 226 (1945) 2, 8, 10, 12, 13, 16, 23

CONSTITUTIONAL PROVISIONS AND STATUTES:

Amendment XIV 3
28 U.S.C. Section 1257(3) 2

MISCELLANEOUS:

Annotation, *Retroactive or Prospective Overruling*, 14 L.ed 2d 992 (1966) 25
Carter, James C., and Elihu Root, Appellant's argument before the Supreme Court in *Hilton* v. *Guyot*, 159 U.S. 113, 123 (1895) 21
Ehrenzweig, *Conflict of Laws* (1962) 23
Rabel, 1 *Conflict of Laws* (2d ed., 1958) 23

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York entered in this case on July 9, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the New York Supreme Court for New York County (1779-1806)[1] is reported at 43

[1] References in parentheses are to the printed record on appeal in the state courts and certified by the Supreme Court for New York County. In addition, the Court of Appeals has certified a supplemental record of the proceedings in that court.

Misc. 2d 462 (1964). The opinion of the Appellate Division (1830-36) is reported at 21 App. Div. 2d 635 (First Department, 1964). The opinion of the New York Court of Appeals is reported at 16 N.Y. 2d 64 (1965). These opinions are reprinted herein as Appendices B (pp. 2a-20a), C (pp. 21a-28a) and D (pp. 29a-51a), respectively.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on July 9, 1965 and a timely motion for reargument and/or to amend the remittitur in this case was denied on February 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), petitioner asserting here, as he did below, a deprivation of rights secured by the Constitution and law of the United States.

QUESTIONS PRESENTED

I

Whether jurisdiction to dissolve a New York marriage can be conferred upon a Mexican court by means of a patently collusive agreement whereby the spouses comply with illusory Mexican statutory requirements through a one-hour sojourn into Mexico by one spouse and an appearance by attorney for the other, when a sister state divorce decree based on the same jurisdictional facts would be an absolute nullity because contrary to jurisdictional requirements as well as the policy of the United States as enunciated by this Court in *Williams* v. *North Carolina,* 325 U.S. 226, (1945), and *Maynard* v. *Hill,* 125 U.S. 190 (1888)?

II

Whether due process of law permits a state to recognize a Mexican divorce decree granted without jurisdiction and therefore a legal nullity, and to support such recognition on the vague and undefined grounds that a "balanced public policy" requires recognition and that as a "matter of comity" the decree may be recognized, when to so recognize the decree and to enforce it against the petitioner directly affects his marital status and property rights?

III

Whether the decision of the New York Court of Appeals recognizing a foreign nation divorce decree based upon wholly fallacious concepts of jurisdiction conflicts with and frustrates this Court's concern for the proper functioning of a federal system and for order and stability in international adjudications affecting American marriages, especially when every other American jurisdiction which has ruled on the validity of such decrees has denied them recognition?

IV

Whether twenty-five years of erroneous enforcement of void Mexican divorce decrees by lower New York state courts should be rectified by denying recognition to the Mexican decree here in question and all other similar decrees hereafter rendered?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV: Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The statutory provisions involved are Articles 22, 23 and 24 of The Divorce Law of the State of Chihuahua, Mexico. (Appendix A).

STATEMENT OF THE CASE

In January 1945 the then-unmarried respondent, Susan L. Rosenstiel (nee Susan Lessman, also known as Susan Steele), accompanied one Felix E. Kaufman to Reno, Nevada where he obtained a divorce from his wife. While still in Reno, respondent and Mr. Kaufman were married (1691-1701).

Except for a four-month stay in California following their marriage and occasional trips abroad, respondent and her first husband, Mr. Kaufman, resided in New York until their separation in 1954 (1992-97).

According to respondent's testimony, in December of 1953 Mr. Kaufman advised respondent that he was in love with another woman. He thereupon abandoned respondent in their New York City apartment. In July or August 1954, after Kaufman demanded a divorce and threatened to discontinue respondent's support, she stated that she was shocked and distressed by his demand for a divorce and by his living openly with another woman, but since there was nothing she could do about it, she "would not stand in (his) way" (1664-67).

The trial court found that respondent and her first husband "*agreed* in New York, where both had been domiciled since their marriage in 1945, to divorce each other" (1789).

One attorney was engaged in New York to represent both the respondent and Mr. Kaufman in all negotiations and arrangements which were to take place in New York regarding the planned divorce (1708-10). Although it was originally contemplated that respondent would travel to Alabama to obtain a divorce, it was later decided that Mr. Kaufman should go to Mexico (151-2). The trial court summarized Mr. Kaufman's sojourn into Mexico as follows:

> "... Immediately prior to the fixed date Mr. Kaufman traveled to El Paso, Texas, and registered at the Del Camino Motel.
>
> "On the morning of October 1, 1954, Mr. Kaufman drove by taxi to the International Bridge leading to Ciudad Juarez, walked across the bridge, and then proceeded to his appointment with Mr. Trias [his Mexican attorney]. Without any delay, Mr. Trias guided Mr. Kaufman to what the latter has identified in his testimony as the courthouse. There Mr. Kaufman was instructed and did sign 'some kind of register'. Pursuant to further directions, he swore to the accuracy of some document (the complaint), written in Spanish, and signed it, although, in fact, *he was not aware of its contents. All of the discussions and transactions were conducted in Spanish, a language with which Mr. Kaufman professed no familiarity.* Within approximately one hour from his arrival in Mexico, Mr. Kaufman returned to El Paso, Texas. Except for this one-hour presence to transact the foregoing, Mr. Kaufman had never been in Ciudad Juarez, Mexico, nor has he returned at any subsequent time." (1792-3, Appendix B, p. 11a; Emphasis added.)

The petition for divorce was based on incompatibility and ill treatment between the spouses (Appendix D, p. 29a), a basis not recognized in New York.

The next day (October 2, 1954) his wife, the respondent herein, appeared in the Mexican court through an attorney acting under a power of attorney executed by the respondent in New York, and apparently delivered the previous day by Mr. Kaufman during his Mexican sojourn (see Appendix D, p. 46a).[2] The answer which was filed by this attorney admitted the allegations of Mr. Kaufman's complaint and purported to submit the respondent to the jurisdiction of the Mexican court. That same day the Juarez court attempted to dissolve the marriage by entering a decree of divorce (1793).

On November 30, 1956 petitioner and respondent went through a marriage ceremony in New York. Petitioner and respondent have had no children.

On April 26, 1962 petitioner brought an action in the Supreme Court of New York County to annul the marriage on the basis that respondent was still married to Felix Kaufman. Respondent answered pleading the Mexican divorce decree (6-7).

After all evidence had been received, the trial court dismissed the jury and annulled the Rosenstiel marriage concluding that although the Mexican decree might have effect in Mexico, it was utterly void and without effect in New York for two reasons: (1) The Mexican court did not have the requisite jurisdiction to dissolve the New York marriage because neither Mr. nor Mrs. Kaufman had ever been domiciled in Mexico,

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[2] Judge Scileppi was pursuaded that Mr. Kaufman delivered his wife's power of attorney; however, the trial court made no finding as to whether it arrived in Juarez in this fashion or by mail.

and (2) The Kaufmans had engaged in a patently collusive agreement to seek the Mexican divorce and that a collusive divorce is invalid in New York because of the state's strong policy against collusive alteration of marriages, which policy was long ago enacted into positive law (Section 51 of the Domestic Relations Law; now Section 5-311, General Obligations Law) (1798). As permitted under New York law, the trial court granted alimony to the respondent even though she and petitioner were never married (1806).[3]

Respondent appealed the annulment and the Appellate Division reversed. The Appellate Division expressly agreed with the trial court that Mr. Kaufman had not established a domicile in Mexico, that he obtained only a technical residence through the formality of signing the Juarez Municipal Register, and that Mrs. Kaufman made no personal appearance whatsoever, except through an attorney. The decree was validated, however, on the basis that the petitioning spouse appeared in person and the answering spouse by attorney. In the opinion of the Appellate Division, this gave the Mexican court jurisdictional power to dissolve the New York marriage.

As to the compatibility of New York's public policy with a validation of such a Mexican divorce decree, the court, after citing numerous opinions of the Appellate Division and trial courts, stated:

> The decisions last cited and others—rendered at various times during the past quarter-century—of

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[3] Respondent's contention at trial, that petitioner is prevented under rules of *res judicata* from contesting the validity of the Mexican decree, was disposed of by the trial court (See Appendix B, pp. 2a, 4a-9a) and was not discussed by either of the state reviewing courts.

> course reflect impressive and reiterated judicial opinion that recognition of the decree with which this case is concerned would be consistent with New York's public policy. No change in public policy has been identified for us; and it is significant that despite the continuing awareness of these decisions in the field of law and in the community, the Legislature has never sought to limit their doctrine.

The opinion did not identify this public policy, it did not specify whether it was a positive policy stated somewhere in New York legislation or in the decisions of the highest state court, or whether its existence was merely a deduction based upon the nonexistence of contrary policy. The court did not specify just how this policy, or absence of policy, augured in support of the validity of the Mexican decree. The evidence of collusion was not discussed.

In the Court of Appeals of the State of New York, petitioner argued:

(1) that the Mexican decree was obtained through a collusive agreement between the Kaufmans in violation of New York policy and statute;

(2) that the Mexican court did not have jurisdiction to alter a marriage based in New York because neither of the Kaufmans established a domicile in Mexico, domicile being the *sine qua non* of divorce jurisdiction as announced in *Williams* v. *North Carolina*, 325 U.S. 226 (1945);

(3) that the divorce was granted on grounds not recognized in New York since New York courts may grant divorce only on the grounds of adultery; and

(4) that the Full Faith and Credit Clause of the federal Constitution *does not require* the recognition of a Mexican divorce decree and that the Due Process Clause of the 14th Amendment *does require* a denial of recognition if an independent inquiry discloses a lack of jurisdiction and if recognition of that court's decree would affect the marital status and property rights of the party contesting its validity.

The New York Court of Appeals, in a 4 to 2 opinion, affirmed the recognition of the Mexican decree by the Appellate Division. Chief Judge Desmond concurred in the result but strongly disagreed with the reasoning of the majority because he was of the opinion that such Mexican divorces should be ruled invalid in this case—but only prospectively and not to include the Kaufman divorce. Judge Scileppi dissented, urging a reversal but *no other* retroactive application.

REASONS FOR GRANTING THE WRIT

The decision by the Court of Appeals of New York in this case represents the first instance that the highest court of any state has held this kind of Mexican divorce decree valid, recognizable, or enforceable in the United States. The decision also represents an abrupt departure from settled New York decisions in closely analogous situations. For example, the New York court had previously invalidated "mail order" divorces, where neither spouse makes a personal appearance in Mexico, *Caldwell* v. *Caldwell,* 298 N.Y. 148 (1948), and *"ex parte"* divorces, where one spouse obtains a technical statutory residence and makes a personal appearance—the other spouse being only constructively

served with notice and a divorce decree rendered by default, *Rosenbaum* v. *Rosenbaum,* 309 N.Y. 371 (1955).

In this case the Court of Appeals has navigated far into the backwaters of jurisdiction hoping to find some justification, any justification, for settling the troubled waters of New York's domestic relations law. However, inspired by its desire to quiet the apprehensions and understandable doubts of the many New Yorkers who have been affected by Mexican divorces, that court lost sight of the open channel which was years ago marked by this Court. That channel is clearly marked by the requirement of domicile. Thus it is difficult to believe that the New York court has recognized this Mexican divorce decree based only upon the technical Mexican residence of Mr. Kaufman and the prearranged appearance by attorney of Mrs. Kaufman, the respondent herein. By giving its support to this Mexican decree—contrary to its own developing line of decisions and without any support from judicial precedent save that of lower New York courts—the Court of Appeals has declared that domicile is *not* an indispensable prerequisite to divorce jurisdiction, a determination in direct conflict with this Court's holding in *Williams* v. *North Carolina, supra.*

The Court of Appeals compared this Mexican decree with a Nevada decree rendered after a six-week residence of one party and declared that this Mexican decree is as reliable as such a Nevada decree (Appendix D, p. 33a). It is submitted that this is an ineffective attempt to gain support from the procedures of a sister state which have been denied full faith and credit and which denials have been upheld by this Court, *Williams* v. *North Carolina, supra; Esenwein*

v. *Pennsylvania,* 325 U.S. 379 (1945). The Court of Appeals also found that the state is not a party to marriage, a conclusion directly at odds with *Maynard* v. *Hill, supra,* and *Fearon* v. *Treanor,* 272 N.Y. 268 (1936).

Finally, the Court of Appeals concluded that a "balanced public policy" requires the recognition of such Mexican decrees and that as a matter of "comity" such recognition offends no public policy of the state. Unfortunately, the court made no offer of what it meant by "comity", what constitutes this public policy, or what counterweights are being balanced. Certainly the state policy relied upon is not legislative, since by statutory standards this Mexican decree is void for two reasons: It was procured through collusion and obtained on grounds not available in New York.

The Court of Appeals made no response to the contention that the constitutional requirement of due process requires a consideration of jurisdiction *prior to* making overly nice distinctions about an unspecified public policy and ephemeral concepts of comity. Indeed, not only did the court not give due process first consideration, it was studiously avoided.

Lurking throughout the proceedings in both appellate courts in New York—but never openly discussed until the separate opinions in the Court of Appeals—has been the real reason for upholding the Mexican divorce in this case: that even though strained legal rationalizations must be employed and even though violence must be done to the concept of jurisdiction, most of the judges of the courts of New York have been unwilling to rule according to the standards set by this Court, the statutory policy of New York, and the con-

stitutional requirements of due process and fairness because of the many other New York marriages conditioned upon the validity of identical Mexican divorces, and because of the fears of these judges that all of these present marriages would be upset by a decision finding the Mexican divorce void.

It should be remembered, however, that two judges of the Court of Appeals did squarely face the anachronistic situation prevailing only in New York and proposed a solution for it. This proposal is to refuse recognition to the void Mexican decree in the instant case and any similar decree rendered hereafter. The separate opinions of Chief Judge Desmond and Judge Scileppi provide ample authority and persuasion for the invocation of such a solution, as does this Court's recent opinion in *Linkletter* v. *Walker,* 381 U.S. 618 (1965). See also *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 364-5 (1932). The New York courts having failed to decide the issues presented in conformity with reason and precedent, it is now left to this Court to vindicate the constitutional guarantee of due process for an individual who is directly and substantially affected by the recognition and enforcement of a void foreign-nation decree by a state court. This guarantee can be vindicated by this Court reviewing the federal questions presented herein and by prescribing uniform national standards for the recognition or nonrecognition of international judgments such as this Mexican divorce decree. The present highly mobile era requires an internationalization of the minimal recognition standards which this Court set more than twenty years ago for the recognition of sister state divorce decrees in *Williams.*

I. JURISDICTION

The Mexican Decree Cannot be Enforced Because It Was Rendered Without Jurisdiction

There are certain minimal requirements for the exercise of judicial power. If these minimal requirements are not met no amount of rationalizing can change the immutable fact that what a court did without these minimal jurisdictional requisites is a nullity. Neither public policy, comity, nor full faith and credit can give validity or effect to what is attempted by a court acting in a jurisdictional vacuum, whether such court is a state court or a court in a foreign country.

Before a court has jurisdiction to dissolve a marriage, it must have jurisdiction over the marriage itself. This can be obtained only by one or both of the spouses establishing a domicile in the divorcing state. When called upon to prescribe the standards which must be met for a court to exercise divorce jurisdiction, this Court, per Justice Frankfurter, stated:

> "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile. *Bell* v. *Bell,* 181 U.S. 175; *Andrews* v. *Andrews,* 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams* v. *North Carolina* [II], 325 U.S. 226, 229.[4]

[4] See also *Harrison* v. *Harrison,* 214 F. 2d 571 (4th Cir. 1954), *cert. denied* 348 U.S. 896, where, in reliance upon *Williams,* a Mexican divorce rendered after a six-week residence of one spouse was found to be "utterly lacking in extra territorial validity". 214 F. 2d at 573.

It cannot be seriously contended that either of the Kaufmans established a nexus with the State of Chihuahua of any permanence whatsoever, or that Chihuahua had even the slighest claim upon their marriage so that such a significant relationship could be forever dissolved.

Even the State of New York, up until this case, recognized the requirement of domicile and the necessity for the divorcing state to have a significant interest in a marriage in order to dissolve it. *Caldwell* v. *Caldwell* and *Rosenbaum* v. *Rosenbaum, supra.* Prior to this case, the only foreign-nation divorce recognized by the New York Court of Appeals involving similar jurisdictional issues was that found in *Gould* v. *Gould,* 235 N.Y. 14 (1923), a case heavily relied upon by the New York appellate courts in this case. In that case a French court dissolved a New York marriage. The parties had been residing in France for a number of years, the divorce action was sharply contested, and the divorce was granted only on a ground recognized in New York, namely adultery. The opinion of the court in the *Gould* case explicitly announced

> "If in the instant case the judgment of the courts of France disclosed that the parties were *merely sojourning* in France at the time the decree of divorce was granted, or that a residence in France was of such *limited duration* as to lead the Supreme Court to believe that the decree was the *result of collusion,* or the judgment was rendered for a *cause not recognized* as sufficient cause for absolute divorce by the law of this state, it may be that the justice presiding would be justified in holding that the decree was contrary to the policy of this state and in a refusal to give effect to the evidence

sought to be established thereby. *We leave those questions open.*" 235 N.Y. 14, 29-30, per Hogan, J. (Emphasis added.)

It is thus apparent that *Gould* supports the position contended for by petitioner and that it cannot be used even as analogical precedent for the decision of the majority in the instant case.

The *Caldwell* case, *supra,* where Mexican divorces-by-mail were outlawed in New York, presents facts so similar to those herein that there is no logical or real difference between them. In *Caldwell* both spouses submitted to the jurisdiction of the Mexican court, as did the respondent here, without ever entering Mexico. The New York court in the instant case found, however, that Mr. Kaufman's one-hour entry into Mexico conferred jurisdiction upon the Chihuahua court in spite of the fact that such an appearance, standing alone, is a meaningless gesture if a decree of divorce is rendered without appearance by the other spouse. *Rosenbaum, supra.*

Since the Mexican court could not dissolve the prior marriage of respondent because it lacked jurisdiction to do so, and since the recognition of the divorce by the New York court is clearly in violation of the policy and law as previously enunciated by this Court, the decision must therefore be set aside.

II. DUE PROCESS

Petitioner Has Been Denied Due Process of Law by the Enforcement Against Him of This Void Mexican Decree

Petitioner has been denied due process of law by the New York courts.[5] The refusal of the New York

[5] This issue was properly before the lower court. See Appendix E, pp. 51a-66a, for relevant portions of petitioner's briefs in the Court of Appeals.

appellate courts to follow this Court's decision in *Williams* and other decisions defining the due process right of an individual to be free from the enforcement of void judgments has directly and substantially affected his marital status and property rights. His right to have his marriage to the respondent annulled, under the broadly based annulment law of the State of New York, has been denied by the New York courts as effectively as if he had not been allowed to present evidence or to seek relief in the first instance. The finding that the Chihuahua divorce decree was rendered with jurisdiction (which it was not) and that it is valid and enforceable against the petitioner in New York (which it is not) are erroneous and contrary to the requirements of due process of law under the Fourteenth Amendment.

The recognition and enforcement of a foreign judgment rendered without jurisdiction, in an action which hinges upon whether the foreign court had jurisdiction to render a valid judgment, has been consistently overruled by this Court as a denial of due process. *Pennoyer* v. *Neff*, 95 U.S. 714 (1878); *National Exchange Bank* v. *Wiley*, 165 U.S. 257 (1904); *Old Wayne Mut. Life Asso.* v. *McDonough*, 204 U.S. 8 (1907); *Baker* v. *Baker, Eccles & Co.*, 242 U.S. 397 (1917); *Riley* v. *New York Trust Co.*, 315 U.S. 343 (1941); *Griffin* v. *Griffin*, 327 U.S. 220 (1946). Due process protects against the enforcement of such a void foreign judgment because due process forbids any exercise of judicial power, absent jurisdiction, which would substantially affect the rights of the party collaterally attacking it. See *Griffin, supra*, 327 U.S. at 231; *Riley, supra*, 315 U.S. at 354 ("such a holding would deny procedural due process").

The *Griffin* opinion states that a judgment rendered without due process of law is no judgment at all, and to recognize it elsewhere would be a denial of due process. *Id.* at 228. Further,

> "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, § 11, Comment c." 327 U.S. at 229.

While it may be that the Chihuahua decree did not, at the time rendered, deprive either Mr. or Mrs. Kaufman of due process of law (since by prearrangement both spouses agreed to submit themselves to the action of the court), this is not the end of the inquiry. By its very nature the effects of a divorce decree cannot be limited to the spouses. *Maynard* v. *Hill, supra.* When, as here, it is applied and enforced by a second court, at a later time, it does operate to deny due process. See *Pennoyer* v. *Neff, supra,* and cases cited therewith.

In *Alton* v. *Alton,* 207 F. 2d 667 (1953), the Third Circuit, per Judge Goodrich, applied these due process principles to a situation where divorce jurisdiction was in issue:

> "If the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere . . . ." 207 F. 2d at 677, *certiorari vacated because of intervening mootness,* 347 U.S. 610 (1954).[6]

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[6] See also *Hanson* v. *Denckla,* 357 U.S. 235 (1958) and *Home Insurance Co.* v. *Dick,* 281 U.S. 402 (1929).

The New York appellate courts sought to avoid comming to grips with the due process difficulties inherent in this case by basing their recognition of the Mexican divorce upon the need for a "balanced public policy" —and if this was not enough—by the assertion that as a "matter of comity" the decree could be recognized. Petitioner submits that neither of these arguments, nor both taken together, can justify the holding of the court, even if there were no issue of due process. Their insufficiency to overcome the denial of due process in this case will be doubly obvious when their insufficiency —standing alone—is demonstrated.

What is New York's public policy with respect to Mexican decrees? The Court of Appeals' majority opinion does not inform us nor does it make any attempt to; however, the concurring and dissenting opinions give some indication. The statutory law is clear; adultery is the only grounds for divorce in the state, consensual and collusive agreements to seek a divorce are sharply forbidden, and annulment actions are given wide latitude. New York's policy with respect to annulment is characterized in this case by the trial court's award of alimony to the respondent after that court had annulled the marriage. New York's policy with respect to foreign nation divorce decrees is clearly represented in past opinions of the Court of Appeals. In *Gould, supra* (the French divorce case), New Yorkers were clearly put on notice that anything less by way of jurisdictional facts than those presented would constitute a lack of jurisdiction for purposes of recognition in New York; further, the *Caldwell* (Mexican mail-order divorces) and *Rosenbaum* (Mexican *ex parte* divorces) decisions, rendering invalid thousands of Mexican divorce-mill products similar to the one in issue here, also appear as clear statements

of the policy of New York. However, the court here completely obliterates this policy by holding that the addition of the simple expedient of a one-hour sojourn into Juarez renders the decree enforceable in New York. It would be expected that such an abrupt departure from settled precedent would be thoroughly explained and that the basis for the departure would be cogently presented. Such is not the case here.

The only possible explanation for the decision of the Court of Appeals is that the "balancing" which was done by that court was done to *overcome* the clear statutory and common law protection of New York marriages which apparently, in the opinion of the majority, is too strict or not in the "modern manner" (see Judge Desmond's concurrence, Appendix D). In other words, the purpose of the decision was to provide an escape hatch for New Yorkers who find the *obvious* policy of the state to be less convenient than that found elsewhere. In reality, the New York court's decision simply illustrates the clear mandate from the legislature and from the court's own prior decisions that any Mexican decree rendered without domiciliary jurisdiction through a collusive agreement and upon concocted and flimsy grounds cannot be enforced in New York.

For the highest court of a state to decide a case of this importance and effect on the basis of a policy which is nowhere identified or discussed in its opinion, and which is contrary to the statutory public policy and the plain import of its own prior decisions, does not, we submit, rest on any basis whatsoever.

The balancing that supposedly assists the lower court's decision is nothing more than a balancing away of petitioner's federally protected rights. These rights

were balanced against the confusion which might result *only if* the relief sought by the petitioner were to have retroactive effect upon the many other such Mexican decrees previously rendered. Rights guaranteed by the Constitution and law of the United States may not be balanced out of existence because of unarticulated qualms about the problems connected with rectifying twenty-five years of erroneous state law. Further, the protection of petitioner's rights need not have any such retroactive effect (see the discussion under Point IV, *infra*).

It must be remembered that this Court reserves final judgment on a state's policy where that policy runs counter to the commands of the federal Constitution. Where Wisconsin's statutory public policy supported, *even directed,* an action by that state's courts contrary to federal law, this Court struck that action down. *Hughes* v. *Fetter,* 341 U.S. 609 (1951). In *Hughes* this Court was faced with a conflict between Wisconsin's statutory policy with respect to causes of action arising outside the state and the strong unifying principle underlying the Full Faith and Credit Clause. Mr. Justice Black, speaking for the Court, stated that this Court is the final arbiter of rights guaranteed by the Constitution and conflicting state policy which would deny those rights ("it is for this Court to choose in each case between the competing public policies involved"). 341 U.S. at 611. In this case the policy of New York, which it is said *requires* the enforcement of this Juarez decree, is in sharp conflict with the principles of due process made explicit by the federal Constitution and must therefore be reviewed by this Court.

Almost as an after-thought the Court of Appeals suggests that as a "matter of comity" the Chihuahua de-

cree may be recognized in New York. As with its public policy conclusion, nowhere did the New York court indicate what it meant by comity and how it comes into play in this case. The constitutional requirement of full faith and credit does not apply to a foreign nation decree and even if it did, the issue of jurisdiction would still be open. A Mexican decree is not even entitled *prima facie* validity despite the allegations of jurisdiction that may appear on the face of the judgment. *Rosenbaum, supra.*

Comity can never be the basis for enforcing a foreign nation decree rendered without jurisdiction. Although comity may be able to perform many roles with respect to jurisdictionally *valid* foreign nation decrees, it does not possess the magic which would be needed to transform this void decree into a valid one.

> "There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation." James C. Carter and Elihu Root, Appellant's argument before the Supreme Court in *Hilton* v. *Guyot,* 159 U.S. 113, 123 (1895).

Mr. Justice Gray assumed the task of defining what varieties of foreign-nation judgments could be entitled to recognition on principles of comity by stating that

> "every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice." 159 U.S. at 166-7.

Later in his opinion Justice Gray devotes himself to a lengthy exposition of the various factors determinative

of whether a foreign court had jurisdiction to render a decree—without which comity is not applicable. Among these requirements he specified that the reviewing court in this country must be satisfied that there has been

> "a full and fair trial abroad before a court of *competent jurisdiction,* conducting the trial upon *regular proceedings,* after due citation or voluntary appearance of the defendant, and *under a system of jurisprudence likely to secure an impartial administration of justice* between the citizens of its own country and those of other countries, and there is *nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment . . .*" 159 U.S. at 202. (Emphasis added.)

Our inquiry concerning comity need never reach the issue of whether for policy reasons the Juarez decree should be recognized. Comity is entirely inapplicable where the foreign decree is a nullity for lack of jurisdiction in the rendering court.

For a state court to employ comity, or to employ undefined and specious notions of public policy in order to recognize this void Mexican decree and to enforce it against the petitioner is a deprivation of his right to due process of law which must be reviewed by this Court.

III. INTERNATIONALIZING WILLIAMS

Uniform Nation-Wide Jurisdictional Standards Should Be Prescribed for the Recognition of International Divorce Decrees

The State of New York is the only American jurisdiction to give full faith and credit to a foreign-nation divorce decree where neither of the spouses was domiciled in the divorcing forum. Every other jurisdiction

which has ruled on such divorces has refused to recognize or enforce them.[7]

The reasons for the nearly uniform American scorn for such decrees, and the questionable public policy of the State of New York which requires recognition of them, are cogently stated in Judge Ryan's opinion in *Gottesman* v. *Gottesman:*

> "Whatever may be the public policy of the State of New York in this respect, and in fairness there appear to be strongly divergent views in New York, this court should not in any way be constrained to surrender to such a callous concept of matrimonial license, which in final analysis is but a pragmatic abdication to alleycat morality." Slip opinion, p. 10 (see note 7).

The considerations prompted this Court to review the *Williams* case for the second time surely apply with even greater force here. There is much at stake here, beyond any local public policy. An abrupt departure from traditional federal notions of jurisdiction over marriage, the frustration of the national concern over the daily instrusions by Mexican courts into American homes and marriages, and the interstate confusion of property rights and personal status resulting from the conflict between the New York courts and the rest of the nation must be reviewed by this Court, especially in view of the denial of due process inherent in every enforcement by a New York court of such a void Mexican decree.

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[7] See *Golden* v. *Golden,* 41 N.M. 356 (1937); *Bobala* v. *Bobala,* 68 Ohio App. 63 (1940); *Bethune* v. *Bethune,* 192 Ark. 811 (1936); *Warrender* v. *Warrender,* 42 N.J. 287 (1964); *Gottesman* v. *Gottesman* (Dist. of Colum. Ct. of Gen'l Sess., No. D2912-64, April 12, 1966). See also Ehrenzweig, *Conflict of Laws,* p. 252 (1962); 1 Rabel, *Conflict of Laws* 513 (2d ed., 1958).

The interstate confusion of rights and status is further highlighted by the fact that the judgment of the New York court is conclusive upon other states through the requirements of full faith and credit. Thus, an anomolous situation is created whereby a sister state which does not recognize and will not enforce such Mexican decrees must, under the mandate of full faith and credit, recognize and enforce a New York judgment founded upon such a decree. A sister state is compelled to give recognition even to that which it has determined deserves no recognition and by the operation of the unifying principles of the Constitution, the spurious and unconstitutional policy of New York is foisted upon other states.

This highly mobile era requires the steadying hand of this Court upon international adjudications—especially those attempting to dissolve American marriages. That steadying hand was lent in 1945 to unify jurisdictional concepts among the states. It is now needed to unify all American jurisdictions behind the standard of jurisdiction based on domicile if foreign-nation divorce decrees are to be recognized and enforced in this country.

IV. PROSPECTIVE INVALIDATION OF VOID MEXICAN DIVORCES

The Determination That Such Mexican Decrees Are Void Need Not Go Beyond This Decree and Those Rendered Hereafter

Although never stated, it appears that the real problem which the Court of Appeals sought to avoid at any cost[8] was the creation of havoc in New York by a declaration that jurisdictionally infirm Mexican decrees are void. This Court should, however, recognize that such havoc need not result from a reversal of the Court of Appeals in this case.

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[8] *That the cost assumes constitutional dimensions is discussed* under Point II, *supra.*

The majority of the Court of Appeals evidently thought that any declaration of invalidity would immediately make bigamous all such marriages, confer questionable status upon the children of such marriages, and utterly confuse any property rights dependent upon the validity of such decrees. This need not be the case. Authority exists in the decisions of this Court and throughout the United States to support a determination by this Court that this Mexican divorce is *void but to reserve application of such a decision only to such other decrees as may be hereafter rendered.*[9] In fact, this Court is free to reverse the present posture of this case and to remand it to the New York Court of Appeals so that it can decide whether and to what extent such a reversal should apply to such Mexican decrees already rendered.[10] Whichever avenue of relief is decided upon it must include the petitioner. To deny relief to the petitioner who has challenged the validity of this patently spurious Mexican decree in four courts, including this Court, would result in manifest injustice. Further, neither this Court nor the New York Court of Appeals may render advisory opinions—which is what would

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[9] *Linkletter* v. *Walker*, 381 U.S. 618 (1965). See also Annotation, Retroactive or Prospective Overruling, 14 L.ed 2d 992 (1966); *Bingham* v. *Miller*, 17 Ohio 448 (1848, legislative divorces declared void but those previously granted were immunized; cited with approval in *Linkletter*, 381 U.S. at 624); *Parker* v. *Port Huron Hosp.*, 361 Mich. 1 (1960); *Molitor* v. *Kaneland Community Unit Dist. No. 302*, 18 Ill.2d 11 (1959); *Kojis* v. *Doctors Hosp.*, 12 Wisc.2d 367 (1961). Also see the dissent of Judge Scileppi, Appendix D, pp. 49a-50a.

[10] As stated in *Linkletter:* "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retroactively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation." 381 U.S. at 629.

result if prospective relief were granted but did not include the petitioner.

The fact that both of the separate opinions by members of the Court of Appeals urged that an invalidation of such decrees need not affect other such decrees already in existence is persuasive. This approach would vindicate petitioner's federal rights and reconcile the enjoyment of those rights with what is alleged to be an otherwise chaotic result in New York. Petitioner submits that if this Court declines to consider this case it will only extend the shadow of doubt which continually lengthens and which blurs the personal status and property rights of increasing numbers of Americans both within and without New York. Affirmative action now, while it may not cure all past ills generated by the recognition of void Mexican decrees, would prevent a perpetuation and extension of the denial to others of the federally protected rights asserted herein by the petitioner.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted so that the important questions raised herein might be reviewed on the merits, or so that the case can be summarily decided and remanded to the New York Court of Appeals for a determination of the extent to which invalidity should attach to Mexican divorce decrees already rendered by Mexican courts.

Respectfully submitted,

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